



June 29, 2016

Via <https://foiaonline.regulations.gov>

Records, FOIA, and Privacy Branch
Office of Environmental Information
Environmental Protection Agency
1200 Pennsylvania Avenue (2822T), NW
Washington, DC 20460
E-mail: hq.foia@epa.gov

RE: Freedom of Information Act Request – Endangered Species Act Biological
Opinions Regarding Pacific Salmonids

Dear FOIA Officer:

On behalf of the Northwest Center for Alternatives to Pesticides (“NCAP”), we hereby request access to the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the pertinent EPA regulations, 40 C.F.R. § 2.100, *et seq.* NCAP is not engaged in the production, sale, or distribution of pesticides outside the United States.

The National Marine Fisheries Service has finalized and provided to EPA seven separate Biological Opinions assessing the impact of certain pesticides on threatened and endangered Pacific salmonids. This FOIA request concerns four of these Biological Opinions: the third Biological Opinion, issued in August 2010¹; the fourth Biological Opinion, issued in June 2011²; the fifth Biological Opinion, issued in May 2012³; and the seventh Biological Opinion, issued in

¹ National Marine Fisheries Service, Endangered Species Act Section 7 Consultation, Biological Opinion, Environmental Protection Agency Registration of Pesticides Containing Azinphos methyl, Bensulide, Dimethoate, Disulfoton, Ethoprop, Fenamiphos, Naled, Methamidophos, Methidathion, Methyl parathion, Phorate and Phosmet (Aug. 31, 2010), *available at* <http://www.nmfs.noaa.gov/pr/consultation/pesticides.htm> (visited May 27, 2016).

² National Marine Fisheries Service, Endangered Species Act Section 7 Consultation, Biological Opinion, Environmental Protection Agency Registration of Pesticides Containing 2,4-D, Triclopyr BEE, Diuron, Linuron, Captan, and Chlorothalonil (June 30, 2011), *available at* <http://www.nmfs.noaa.gov/pr/consultation/pesticides.htm> (visited May 27, 2016).

³ National Marine Fisheries Service, Endangered Species Act Section 7 Consultation, Biological Opinion, Environmental Protection Agency Registration of Pesticides Oryzalin, Pendimethalin, Trifluralin (May 31, 2012), *available at* <http://www.nmfs.noaa.gov/pr/consultation/pesticides.htm> (visited May 27, 2016).

January 2015.⁴ Each of these Biological Opinions concluded that some or all of the pesticides considered would jeopardize listed salmonids. Specifically, the National Marine Fisheries Service concluded in these final Biological Opinions that 14 pesticides – bensulide, dimethoate, ethoprop, methidathion, naled, phorate, phosmet, 2,4-D, oryzalin, pendimethalin, trifluralin, diflubenazuron, fenbutatin oxide, and propargite (the “14 jeopardy pesticides”) – will each cause jeopardy to one or more listed Evolutionarily Significant Units of listed Pacific salmonids.

Requested Records

Please provide the following documents:

1. EPA’s notification to the National Marine Fisheries Service of its final decision on how to modify its authorizations of each of the 14 jeopardy pesticides as required by 50 C.F.R. § 402.15(b), and any and all supporting records for each and every such decision.
2. Any request by EPA to the National Marine Fisheries Service to reinitiate consultation on any or all of the 14 jeopardy pesticides pursuant to 50 C.F.R. § 402.16, and any and all supporting records for each and every such request.
3. Any and all changes that have taken effect between January 1, 2010 and the date of this request in the registrations and labels (including application methods and rates), product formulations, and/or tolerances of any and each of the 14 jeopardy pesticides (including all product formulations containing those active ingredients), and any and all supporting records for each and every such change.
4. Any and all water monitoring data collected by or provided to EPA between January 1, 2010 and the date of this request, on the concentrations of any and each of the 14 jeopardy pesticides in any water body in Washington, Oregon, Idaho, and/or California, and any and all supporting records.
5. Any and all analysis conducted by or provided to EPA between January 1, 2010 and the date of this request on the effects of any and each of the 14 jeopardy pesticides on salmonids, including any and all supporting documents.

We would ask that you provide us with the documents that are responsive to our first, second, and third requests above promptly. If the documents that are responsive to our fourth and fifth requests are voluminous or require additional time to collect and produce, please notify

⁴ National Marine Fisheries Service, Endangered Species Act Section 7 Consultation, Biological Opinion, Environmental Protection Agency Registration of Pesticides Containing Diflubenazuron, Fenbutatin oxide, and Propargite (Jan. 7, 2015), *available at* <http://www.nmfs.noaa.gov/pr/consultation/pesticides.htm> (visited May 27, 2016).

us and we will work with you to either refine our request or otherwise identify a reasonable approach to a response to this request.

If EPA believes some responsive records may be exempt from disclosure, please segregate and release the clearly non-exempt records right away. Also, please feel free to call to discuss whether we intend that potentially exempt material be released so the agency is not expending resources to compile and review such records.

Exemptions and Discretion to Release Records to Promote the Public's Right to Know

If EPA believes some exemptions apply to the requested records, we ask the agency to exercise its discretion to disclose the records in its discretion. President Obama has directed federal agencies to administer FOIA to err on the side of openness. *See* Memorandum for the Heads of Executive Departments and Agencies Re: Transparency and Open Government (Jan. 21, 2009). To implement this transparency directive, Attorney General Holder issued guidance to federal agencies, which provides:

an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

FOIA Mem. for the Heads of Executive Branch Departments and Agencies from Attorney General Holder (Mar. 19, 2009), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

Request for a Fee Waiver

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107. EPA has granted requests for fee waivers from non-profit organizations on similar requests, EPA-HQ-2015-005991 and EPA-HQ-2015-006370.

The Northwest Center for Alternatives to Pesticides (“NCAP”) works to protect community and environmental health and inspire the use of ecologically sound solutions to reduce the use of pesticides. NCAP protects people and communities from pesticide exposures and focuses on the most vulnerable populations. The organization protects waterways from harmful pesticide exposures and safeguards native bees, Pacific Salmon and other wildlife. NCAP promotes and expands organic and sustainable agriculture by partnering with farmers to advance ecological alternatives.

NCAP has no commercial interest in the requested records. Its sole interest in obtaining the records is to analyze the information, incorporate into educational materials and advocacy to EPA, and other governmental agencies, and disseminate the information along with NCAP's analysis to the public. NCAP is a news media requester in that it actively gathers information on pesticides, turns raw information into reports and analysis, and disseminates the information and analysis to the public. Accordingly, only duplication costs could be charged for this request.

NCAP asks for a fee waiver because "disclosure of the information is in the public interest, because it is likely to contribute significantly to public understanding of these operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(iii). This request concerns a matter of over-riding public importance. Exposure of endangered and threatened salmonids to pesticides is an issue of heightened public interest. The public has been demanding protections for endangered species from pesticides for decades and has advocated for buffers to minimize exposures. Disclosing the requested records will further the public's right to know about EPA's responsiveness to these public demands, and will enhance the public's ability to participate in regulatory processes involving these pesticides. The public has a right to know the basis for EPA's actions to protect salmon from pesticides and the extent of communications with interested industry groups. Daylighting this information will contribute greatly to public understanding of the operations of EPA on this public policy matter.

Moreover, NCAP has both the expertise to analyze the requested records and the ability to disseminate the information and its analysis to the public. NCAP staff possess technical expertise in pesticides and conservation science. Staff hold Master's degrees in Energy and Resources; Adult Education and Agricultural Extension; and Public Policy. One staffmember holds a Ph.D. in Plant Pathology and Botany. NCAP is represented on the Pesticide Program Dialogue Committee (PPDC), a federal advisory board advising the U.S. EPA. NCAP is also a member of the Columbia River Basin Toxics Reduction Working Group, sits on the Oregon Organic Coalition, and until recently held a seat with the Western IPM Center. NCAP regularly reviews, analyzes and shares information with the public on state (OR, WA, ID, and CA) and federal government pesticide use decisions or deliberations, and science reports on pesticide impacts to wildlife and to people. It has analyzed and used such data in reports with selected examples, including:

- *Journal of Pesticide Reform* (published from 1981-2006);
- *A Preliminary Investigation in Oregon, Washington, and California: Growers Learning About and Implementing Mandatory Streamside Pesticide Buffers;*
- *Poisoned Waters: Pesticide Contamination of Waters and Solutions to Protect Pacific Salmon;*
- *Diminishing Returns: Salmon Declines and Pesticides;* and

- *Altering Oregon's Destiny: Hormone Disrupting Pesticides in the Willamette River.*

NCAP also analyzes and uses such data in comments to the EPA on registration review and other decisions. NCAP regularly shares information on its web properties, which garner approximately 4,500 monthly visits. It also disseminates its analysis and data to 13,500 concerned citizens via email monthly action alerts with features and other articles written by NCAP experts. In addition, NCAP shares information and analysis through social media platforms, particularly Facebook (4,700 followers) and Twitter (1,100 followers).

NCAP is eminently qualified and able to analyze the requested records and disseminate the information on this important issue to the public. Accordingly, it is entitled to a fee waiver.

Please do not hesitate to call me to clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (206) 343-7340 ext. 1020.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Goodin', with a long horizontal line extending to the right.

Amanda W. Goodin